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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Amendment of Part 20 and 24 of the Commission's Rules — Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap	))))))	WT Docket No. 96-59
		DOCKET FILE COPY ORIGINAL
Amendment of the Commission's Cellular PCS Cross-Ownership Rule	))	GN Docket No. 90-314

REPLY COMMENTS OF WESTERN WIRELESS CORPORATION

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SUMMARY

Western respectfully submits that, in light of the record evidence presented in this rulemaking, the FCC must modify its spectrum aggregation limits to allow cellular licensees and investors to acquire broadband PCS licenses in their area of cellular operations, except in those situations where there is a reasonable fear of anti-competitive conduct. In *Cincinnati Bell*, the Sixth Circuit held that the current cellular/PCS cross ownership rules are arbitrary because they impose restrictions on cross-ownership without any demonstration that anti-competitive motive or opportunity actually exists. Arbitrarily precluding a class of potential licensees from obtaining PCS licenses without a supported economic justification for doing so flies in the face of standards for rational rulemaking, contradicts the treatment of other acknowledged competitors for PCS licensees (i.e., Local Exchange Carriers), sacrifices the benefits of cellular carriers' expertise and infrastructures and economies of scope in promoting efficient and expeditious deployment of PCS and contravenes recent Congressional directives to eliminate barriers to entry in telecommunications markets.

The Commission must support its rules with record evidence, and the evidence in this proceeding, as supplemented by the commenters, cannot support the 10% significant overlap and 20% ownership attribution standards. Western advocates that a "significant" overlap should arise only where at least 20% or more of the PCS market's service area is included within the cellular CGSA, and that an attributable ownership interest should be set at any equity interest of 50% or greater or *de facto* control. These modifications will promote the expeditious development of PCS and the widest range of PCS services available

to the public by drawing from cellular carriers' expertise and existing infrastructure without in any way opening the door to anticompetitive conduct.

Western also submits that the Commission should permit partitioning of PCS license areas to any entity qualified to be a Commission licensee, as a way to encourage participation by small businesses and to allow PCS carriers a reasonable opportunity to avail themselves of the divestiture rules. Western also submits that the record evidence, as supplemented by the commenters, supports: changes to rules regarding F block eligibility to allow holders of C block licenses to exclude them from their total assets and gross revenues; retention of the most favorable installment method for F block licenses; not extending installment plans or bidding credits to D and E blocks; increasing upfront and down payment amounts for the F block and relaxing the ownership disclosure rules and the requirements for audited financial statements.

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REPLY COMMENTS OF WESTERN WIRELESS CORPORATION

Western Wireless Corporation ("Western") hereby submits its Reply Comments in response to the proposals set forth in the Federal Communications Commission's ("FCC's") *Notice of Proposed Rulemaking* in the captioned proceeding[1/] and the comments received in response to it (the "Comments"). The record that has been developed in response to the *Bidding/Spectrum Cap NPRM* supports Western's contention that the FCC must modify its spectrum aggregation limits to give greater latitude to cellular licensees or their investors to acquire PCS licenses in markets overlapping their cellular geographic service areas ("CGSAs"). Such modification will promote the expeditious development of PCS and the widest range of PCS services available to the public at the lowest possible cost by removing artificial entry barriers and drawing on cellular operators' expertise and existing

[1/]*Notice of Proposed Rulemaking (Amendment of Part 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap* (WT Docket No. 96-59); *Amendment of the Commission's Cellular PCS Cross-Ownership Rule* (GN Docket No. 90-314)), FCC 96-119 (rel. March 20, 1996) ("*Bidding/ Spectrum Cap NPRM*").

infrastructure. In these Reply Comments, Western also responds to a number of other issues raised by the commenters in response to the *Bidding/Spectrum Cap NPRM*.

I. The Record That Has Been Developed in Response to the *Bidding/Spectrum Cap NPRM* Supports Relaxation of the Cellular/PCS Eligibility Restrictions

A. In Revisiting Its Cellular/PCS Eligibility Rules, the FCC Is Required To Articulate a Rational Connection Between its New Rules and the Rulemaking Record

In *Cincinnati Bell Telephone Co. v. FCC*,[2] it was held that the cellular/PCS cross-ownership restriction of Section 24.204 of the Rules was the "result of arbitrary decisionmaking" and that "the FCC provided little or no support for its assertions that Cellular providers, released from all regulatory shackles and given free reign to roam the wireless communications landscape, might engage in anti-competitive behavior or exert undue market power through, for example, predatory pricing schemes."[3] The Court required that, on remand, the FCC provide more than its own unsupported assertions and post-hoc rationalization to justify its rules.[4] Thus, as the FCC reconsiders its cellular eligibility rules, it must base such rules on the rulemaking record which has heretofore been developed and has now been supplemented the Comments. That record supports a relaxation of both the significant overlap and ownership attribution rules.

Section 309(j) of the Communications Act conferred authority upon the FCC to use a competitive bidding system for awarding wireless communications licenses) and charged

[2] 69 F.3d 752 (6th Cir. 1995).

[3] *Id.* at 762-63.

[4] *Id.*

the FCC, in specifying eligibility for the licenses and designing the methodology for the auction, to promote "development and rapid deployment of new technologies, products and services for the benefit of the public, including those residing in rural areas" and to "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of licensees . . . ."[5] Pursuant to this congressional mandate, the FCC concluded that its goal was to promote broad participation by wireless communications businesses in PCS, to ensure that existing cellular operators did not exert undue market power, but at the same time to take advantage of cellular operators' expertise and existing infrastructure for the expeditious development of PCS.[6] This balance between concerns over anti-competitive conduct and the benefits of cellular carriers' expertise and infrastructure in promoting PCS development must also be made in the context of more recent Congressional directives. The Telecommunications Act of 1996 has as one of its purposes the "remov[al of] all barriers to entry in the provision of telecommunications services."[7] Thus, any cellular/PCS eligibility restriction adopted by the FCC must be reasonably supported by the record evidence as the least restrictive alternative in thwarting any anti-competitive effects on the PCS market, rather than a simple preclusion of a class of potential licensees from obtaining PCS licenses without a supported economic

[5] 47 U.S.C. §309(j)(3)(A)-(B).

[6] *Cincinnati Bell*, 69 F.3d at 757 (*citing Second Report and Order (Amendment of the Commission's Rules to Establish New Personal Communications Services)*, GEN Docket No. 90-314, 8 FCC Rcd. 7700 (1993) ("*PCS Second R&O*")).

[7] Telecommunications Act of 1996, 47 U.S.C. §253, H.R.Rep. 104-458 at 126 ("1996 Act").

justification.[8] Based on the record in the instant proceeding, a refusal to relax the cellular/PCS cross-eligibility rules would fly "manifestly in the teeth" of the Sixth Circuit's remand.[9]

1. <u>The Significant Overlap Standard Must Be Relaxed</u>

In *Cincinnati Bell*, the Sixth Circuit found the cellular eligibility restriction arbitrary in part on the basis that the "overlap benchmarks are not rationally related to the FCC's asserted goal of preventing undue market power."[10] The Commission must now devise a new overlap standard that, in view of the record, strikes a reasonable balance between its stated concerns of anticompetitive conduct and both its desire to draw on cellular expertise and infrastructure to expedite deployment of PCS and the Congressional imperative to remove all barriers to entry in the provision of telecommunications services.

In its Comments, Western demonstrated that a higher population overlap standard has support in several ways. First, the acknowledged benefits of ubiquitous coverage and wide-area service would be promoted by permitting current cellular licensees to dovetail the irregular boundaries of their cellular markets with PCS markets in order to maximize

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[8] *Cincinnati Bell*, 69 F.3d at 762, 764.

[9] *Yablonski v. UMWA*, 454 F.2d 1036, 1041-42 (1971) (stating that when a higher court requires a lower court or an agency to reexamine a decision, it may not simply "utilize as ground[s] for a fresh determination a consideration" already discarded by the higher court).

[10] *Cincinnati Bell*, 69 F.3d at 763. The cited statement was made in Radiofone's petition, which was granted by the Court. The Court was persuaded by Radiofone's reasoning that the FCC's conclusion that a business with a twenty percent interest in a cellular carrier "that serves a mere ten percent of the Personal Communications Service area could exert undue market power is implausible." *Id.*

seamless coverage.[11] Second, the rules currently permit a situation where a 30 MHz licensee may fail to serve up to one-third of the population of its PCS market after 10 years and still retain its license for the entire market while the spectrum in that unserved area (most likely in the periphery of the market rather than in its core) lies fallow. At the same time, the FCC has reached the inconsistent conclusion that an attributable investor in a cellular licensee whose CGSA includes a mere 10% of the PCS service area population is unfit to hold a PCS license in that market for fear that PCS will not be aggressively promoted in an area that might otherwise remain unserved.[12] Clearly, the public would benefit by the seamless coverage afforded by a PCS licensee who from the outset provides wireless service in the fringe rural areas on its cellular facilities. Third, it is expected that PCS licensees will build out the urban areas within their markets first (based on the suitability of PCS to more populous regions and the higher profit potentials) and provide service to the rural areas only much later, if at all. Thus, a cellular carrier, such as Western, providing cellular service to the fringe rural areas of a PCS market would be likely to compete as vigorously as a PCS carrier without any rural cellular interests in that market.[13] Rural cellular customers, who are typically served by analogue systems, might not otherwise have wide-area access to the service benefits of digital systems without the added expense of roamer arrangements. Finally, and most important, the FCC must justify the disparate treatment afforded LECs, who, under FCC rules, may without restriction obtain a PCS license

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[11]Western Comments at 15-18.

[12]*Id.* at 18.

[13]*Id.* at 19-20.

in a market in which they already provide local exchange service, regardless of the level of population overlap between the two markets.[14] The FCC has recognized "that PCS is likely to be both a complement and potentially a competitor to local exchange carriers,"[15] and rulemakings, articles and speeches appear daily promoting or extolling the virtues of entry into the local telecommunications monopolies by PCS and other services.[16] The FCC used very similar language to describe the anti-competitive threat that might result from permitting cellular carriers and LECs to hold PCS licenses in their own markets,[17] but then accorded them very disparate treatment, by permitting LECs to bid for PCS licenses without restriction while severely restricting cellular licensees.[18] In fact, rather than competing on an even playing field, the LECs have been given special help. Rural telephone companies are currently the only entity to whom geographic partitioning of a PCS market is available.[19] Eliminating (or at least loosening) the cellular/PCS eligibility restrictions would be the appropriate means for the FCC to address these concerns.

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[14] *Id.* at 8-12.

[15] *PCS Second R&O*, 8 FCC Rcd. at 7747, ¶ 112.

[16] *See, e.g., Notice of Proposed Rulemaking (Implementation of the Local Competition Provisions in the Telecommunications Act of 1996)*, CC Docket No. 96-98, FCC 96-182 (rel. April 19, 1996). Any attempt to distinguish cellular carriers from LECs on policy grounds would be unfounded. Any incentives to thwart the rapid development of PCS to protect an existing market position would be as likely to affect a LEC's use of PCS spectrum as it would a cellular carrier's.

[17] *PCS Second R&O*, 8 FCC Rcd. at 7747, ¶ 112.

[18] *Id.* at 7751-52, ¶¶ 126-27.

[19] 47 C.F.R. §24.714.

The record support for Western's contention that the 10% standard for population overlap should be raised to at least 20%[20] is augmented by several Comments,[21] and none of the commenters who advocate maintenance or further restriction of the current threshold have adduced any support for their position to satisfy the Sixth Circuit's requirement that the "record . . . justify its [the FCC's] Cellular eligibility restrictions."[22] The Cellular Telecommunications Industry Association ("CTIA") supports a significant relaxation of the rules.[23] CTIA demonstrated, using the Besen and Burnett economic analysis, that "in order for the weighted average market share of a cellular licensee acquiring a 30 MHz PCS license to exceed the 23.5% market share allowed a non-cellular licensee,[24] the population overlap would have to exceed 40 percent."[25] Significantly, the Besen and Burnett economic analysis demonstrates that a 23.5% market share falls

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[20] Western Comments at 12-20. The Court in *Cincinnati Bell* expressed doubt that a party with an interest in a cellular provider would have reduced incentive to compete with that cellular provider as a PCS licensee regardless of the degree of market overlap or level of ownership, in view of the cost of the PCS license, the build out requirements and competitive demands. 69 F.3d at 760.

[21] *See* AT&T Wireless Services, Inc. Comments at 9 ("AT&T") and Cellular Communications of Puerto Rico Comments generally ("Puerto Rico"), requesting that if the overlap restriction is maintained, that cellular licensees be permitted 20 MHz of PCS spectrum in order to allow them to provide competitive services.

[22] *Cincinnati Bell*, 69 F.3d at 763.

[23] CTIA Comments generally. *See also* CTIA Petition for Reconsideration (Dec. 8, 1993) at 21-22, Stanley B. Besen and William B. Burnett, "An Antitrust Analysis of the Market for Mobile Telecommunications Services" (Dec. 3, 1993) ("Besen and Burnett").

[24] This percentage represents the 40 MHz of PCS spectrum in any MTA or BTA that a single party may hold out of the 170 MHz of total broadband PCS and cellular spectrum.

[25] CTIA Comments at 12-13. The 40% figure is derived from the equation 40% x 25 MHz cellular spectrum + 30 MHz PCS spectrum = 40 MHz total weighted spectrum.

below the 35% market share established under the *Department of Justice and Federal Trade Commission Horizontal Merger Guidelines* (Apr. 2, 1992) (the "*Merger Guidelines*") as the threshold for unilateral exercise of market power.[26] Precedent indicates that the FCC may properly give deference to views of the Federal Trade Commission.[27] Thus, the current 10% overlap standard is far less than CTIA's reasoned economic analysis and the *Merger Guidelines* could support.

Relaxation of the significant overlap rule also finds support from the Comments of Vanguard Cellular Systems, Inc. ("Vanguard"): "the evolving competitive wireless marketplace, with any number of PCS, ESMR and other competitive services, makes it increasingly unlikely that cellular providers could successfully engage in anticompetitive practices or exert undue market power.[28] Another commenter reasons:

> Now with two cellular licensees, enhanced SMR, mobile satellite service, and at least three facilities-based PCS market entrants soon to be in every service area, the competition in mobile telephony promises to be frenzied. Even assuming a cellular licensee is able to win two 10 MHz blocks of PCS spectrum in its cellular service area [footnote omitted] and build

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[26] CTIA Comments at 7.

[27] For cases where the FCC relied on the *Merger Guidelines, see, e.g., Notice of Proposed Rulemaking (In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace)*, FCC No. 96-123, ¶ 44 (rel. March 25, 1996); *Order (In the Matter of Waiver of the Commission's Rules Regulating Rates for Cable Services as Applied to Cable Systems in Dover Township)*, FCC No. 95-455 (rel. Nov. 6, 1995); *Review of the Prime Time Access Rule*, 11 FCC Rcd. 456 n.44 (1995). For a recent example for where the FCC relied upon the statistical analysis of the FTC, *see First Report and Order (Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems* (WT Docket No. 96-18); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding* (PP Docket No. 93-253)), FCC 96-183 (rel. April 23, 1996).

[28] Vanguard Comments at 5.

> out its system, it could not engage in any anticompetitive behavior or otherwise minimize competition in the mobile wireless telephony market.[29]

AT&T also mirrors this logic: "given the number of CMRS licensees currently in, and about to enter, the market as a result of the PCS and SMR auctions, there is little danger of undue influence and anticompetitive behavior associated with allowing cellular licensees to obtain up to 20 MHz of PCS spectrum that overlaps their cellular operations."[30] Radiofone, Inc. ("Radiofone") also demonstrates that "cellular providers already face competition from a variety of other wireless services, and will soon face competition from the PCS winners. Permitting a cellular carrier to also have 30 MHz of PCS spectrum would not detrimentally impact a market that already consists of so many wireless service providers."[31] GTE Service Corporation ("GTE") advocates that the FCC eliminate all CMRS spectrum aggregation limits, arguing that FCC policies should encourage cellular carriers' participation in PCS both within their service areas as well as outside their existing markets. GTE maintains that spectrum caps unduly restrain the legitimate business activities of licensees and that there is no evidence to support a finding that aggregation limits are necessary.[32] Radiofone offers similar reasoning: "There is similarly no documentary support for imposing the 45 MHz spectrum cap on small cellular carriers. Limiting cellular carriers to 20 MHz

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[29] Puerto Rico Comments at 2-3.

[30] AT&T Comments at 9.

[31] Radiofone Comments at 4.

[32] GTE Comments at 8.

(under the 45 MHz spectrum cap) is as arbitrary as limiting them to 10 MHz (under the PCS/cellular cross-ownership rule). And there is no justification for either limit."[33]

In addition, a relaxation of the significant overlap standard would ameliorate the concerns of the Virginia PCS Alliance that a bright line population threshold will often result in much higher overlap percentages in a given BTA as opposed to the relevant MTA and thus preclude cellular carriers in many instances from acquiring a BTA which may be within their financial means when the corresponding MTA is too expensive.[34] If the FCC must use the same percentage overlap standard in MTAs and BTAs, then a less restrictive standard would have a less preclusive effect in the smaller BTA markets. Doing so would increase the number of rural telephone companies with cellular holdings that would be eligible to bid on PCS licenses, and, thus, increase opportunity for rural telephone companies in accordance with 47 U.S.C. §309(j)(3).

Those commenters who oppose relaxation of the cellular/PCS eligibility rules have not differentiated between the overlap rule and the attribution rule, nor have they presented any justification beyond the same unsupported speculation about the potential for anti-competitive conduct and undue market concentration that the Sixth Circuit has already rejected for maintaining (or, by implication, tightening) these rules.[35] In short, these

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[33] Radiofone Comments at 3.

[34] Virginia PCS Alliance Comments at 8-9 ("Virginia").

[35] *See, e.g.,* Columbia Cellular Inc. Comments at 2 ("Columbia") and DCR Comm., Inc. Comments at 12-15 ("DCR") (making the speculative assumption that relaxing the rules would further restrict the ability of small businesses to compete without presenting any supporting evidence); Ken Bray Comments at 1 ("Bray") (incorrectly stating the cross-ownership rule already prohibits cellular companies from bidding for PCS licenses);

commenters all seem to ignore the fact that the Sixth Circuit has found the record evidence inadequate to support the current rule and have failed to proffer any new evidence to supplement the record.

A relaxation of the significant overlap rule is both reasonable and supported by the supplemental record elicited by the *Bidding/Spectrum Cap NPRM*. No evidence has been presented that demonstrates that a 10% overlap restriction works to the benefit of the public. In fact, it seems that by so restricting cellular licensees' eligibility, the FCC has delayed service to certain areas of the public, contrary to 47 U.S.C. §309(j), and created barriers to entry by rural telephone companies and rural cellular carriers such as Western in contravention of the 1996 Act. Without supporting evidence, retaining this restriction is unreasonable,[36] and the FCC will be subject to further appeal and remand, thus delaying provision of PCS service to the public. Relaxation is in the public interest and tends to

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PersonalConnect Comm. L.L.C. Comments at 4 ("PCC") (making the very speculative assumption that the only reason that cellular carriers want PCS spectrum is to warehouse it, without responding to the Sixth Circuit's statement that such an assumption must be supported by evidence to be sustained or addressing the "only rational conclusion" apparent to the Sixth Circuit that a PCS licensee must compete at an efficient level to remain in the marketplace, *Cincinnati Bell*, 69 F.3d at 760); Telephone and Data Systems, Inc. Comments at 3-4 ("TDS") and Mountain Solutions Comments at 10-11 ("Mountain") (stating that the FCC's record supports the eligibility rules, which the Sixth Circuit said is not the case); Gulfstream Comm. Inc. Comments at 7-13 ("Gulfstream") (making the speculative assumptions that relaxing the eligibility restrictions will lead to warehousing and the barring of anyone but the A, B and C-block winners from winning the remaining PCS spectrum), Rendall and Assoc. Comments at 11-12 ("Rendall") (unsupported assertion that any relaxation of the rules will reduce opportunities for small businesses), Conestoga Wireless Co. Comments at 4; and KMTel, L.L.C. Comments at 7 ("KMTel") (requesting that no cellular licensee be permitted to bid for any PCS market for which there is any overlap without providing justification).

[36] *Cincinnati Bell*, 69 F.3d at 764.

harmonize rules which now produce inconsistent results, all in contravention of the agency's statutory mandates.

2. The Ownership Attribution Standard Should Be Raised from its Current Level of 20% (or Actual Control) to 50% (or Actual Control)

The Sixth Circuit found the 20% cellular attribution standard to be arbitrary because it "bears no relationship to the ability of an entity with a minority interest in a Cellular licensee to obtain a Personal Communications Service license and then engage in anti-competitive behavior."[37] The Court reasoned that such ability to act anti-competitively is based on the entity's means of "controlling the behavior of the Cellular licensee."[38] The Court rejected the FCC's argument that even in situations where an entity with a minority interest in a Cellular licensee cannot control that licensee, the entity's "substantial stake in the Cellular licensee would reduce the entity's incentive to compete–as a Personal Communications Service licensee–with the Cellular company in which it holds a minority interest.[39] The Court also rejected the FCC's reliance on the need for an easily administrable, bright-line rule, because the FCC has adopted less restrictive yet easily administered rules in other situations, *e.g.*, the FCC's attribution rule for determining when businesses owned by minorities or women (currently small businesses for C-block) will be eligible to bid on spectrum in the C-block auctions, as argued by Cincinnati Bell.[40] As the Comments demonstrate, the FCC should focus primarily on those ownership interests

[37] *Id.* at 759.

[38] *Id.*

[39] *Id.* at 760.

[40] *Id.*

that it has recognized in the very context of its cellular/PCS ownership restrictions as having the most potential for anti-competitive effect, *i.e.*, controlling interests.[41]

Western has demonstrated that there is no data or other support for the 20% rule, and the FCC should, in light of the Sixth Circuit's apparent reliance on control as the touchstone for a reasonable test and exhortation to the Commission to examine less restrictive alternatives to the bright line cellular attribution rule that is now before the FCC on remand,[42] substitute a test based on control similar to that set forth in 47 C.F.R. §24.709(b)(6).[43] In agreement with Western, both AT&T and GTE support an attribution standard based on control principles.[44] As stated by GTE, "[c]ontrol over a company's business decisions does not necessary coincide with the level of ownership. The only way

[41]In the context of modifying Section 24.204 of the Rules to create additional opportunities for entities with non-controlling, attributable cellular interests to bid on in-market PCS licenses and subsequently to divest offending interests, the Commission stated: "We now conclude that entities holding controlling interests have greater incentives to act anticompetitively in the auction process than entities with non-controlling interests...." *Third Memorandum Opinion and Order (Amendment of the Commission's Rules to Establish New Personal Communications Services)*, GEN Docket No. 90-314, 9 FCC Rcd. 6908, 6914, ¶ 33 (1994).

[42]*Cincinnati Bell*, 69 F.3d at 759, 761.

[43]The rule is used to determine whether a C-block bidding entity's control group possesses the requisite level of equity and *de facto* control over the applicant to permit the exclusion of assets and revenues of non-attributable investors in the applicant. Thus, in the context of eligibility for the C-block auction, the FCC assumes that an outside investor with up to a 49.9% equity interest does not measure for purposes of the eligibility of the enterprise. The FCC has in this context also established a rule that requires a case-by-case determination of "control" in all cases where there is less than a 20% equity interest, rather than relying on an easily applied, bright-line rule. 47 C.F.R. §24.709(b)(6).

[44]AT&T Comments at 9-11 and GTE Comments at 10-13. *See also* Comments of ALLTEL Corporation at 8, advocating "a single modified Part 20 spectrum cap under which any non-controlling interest of 49% or less would be non-attributable."

to ensure that an investor has a controlling interest in a company is to examine the facts of each case."[45] In advocating a 30-35% attribution standard, CTIA relied primarily on its demonstration that a 20% ownership interest would not lead to undue market power, because the 45 MHz limit on CMRS spectrum set forth in 47 C.F.R. §20.6 constrains such power, pointing out also that a low attribution standard decreases innovation and efficiency. However, CTIA cited as support for the higher standard the fact that FCC precedent rarely has found ownership attribution as low as 20% to constitute de facto control.[46]

In justifying its decision to raise the attribution threshold from 20% to 40% for designated entities, the FCC stated that "many designated entities are merely passive investors in cellular operators and, because of their size, are unlikely to influence pricing decisions."[47] The FCC has not demonstrated any difference between designated entities and cellular licensees that would justify a 40% interest being considered passive and thus non-attributable for designated entities and only 20% being considered passive for other cellular licensees.[48] In addition, the FCC permits a wide range of supermajority provisions

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[45] GTE Comments at 12.

[46] CTIA Comments at 9-11; 14. *See also* CTIA Petition for Reconsideration (Dec. 8, 1993) at 11-25 and the Besen and Burnett antitrust analysis attached thereto. CTIA and Cincinnati Bell Telephone Company's ("CBTC") request that the FCC adopt a single majority shareholder exception to the attribution rules also supports the idea that the ownership attribution rule should be based on control, not a 20% or some other arbitrary threshold below 50%. "Where there is one entity (or group of affiliated entities) that controls a majority of a cellular licensee, whether it be through stock interests in a corporation or general partner interests in a limited partnership, it is simple to determine who controls the cellular license." CBTC Comments at 6 (emphasis added). *See also* CTIA Comments at 15.

[47] *PCS MO&O*, 9 FCC Rcd. at 5007, ¶ 125.

[48] Western Comments at 22-23, AT&T Comments at 10 (suggesting the 40% attribution standard as an alternative to an attribution standard based on control principles).

to protect investors in entrepreneur block PCS licensees without causing their ownership interests to be attributable for eligibility and small business purposes, because it has found that such provisions act to protect shareholder investments without conferring control.[49] In the interest of coherent regulation, the FCC must eliminate these inconsistencies.[50]

II. The Partitioning Rules Should Be Modified to Allow the Sale of a Portion of a PCS Market to Any Qualified Entity

In its Comments, Western advocated that the FCC should greatly expand the pool of potential buyers of partitioned PCS markets as part of this rulemaking or any other imminent rulemaking on the subject.[51] Western argued that closely interrelated with the ability of a cellular carrier to obtain PCS spectrum in excess of 10 MHz in the area of its cellular

[49] *Fifth Memorandum Opinion and Order (Implementation of Section 309(j) of the Communications Act-Competitive Bidding)*, 10 FCC Rcd. 403, 447-8, ¶¶ 81, 82 (1994).

[50] As stated above, those commenters supporting maintenance of the current cellular/PCS eligibility restriction have not adduced any further record support which would withstand future appeal. They have presented no facts, studies or even cogent theories. At best, they offer only thin speculation, and, thus, retention of the 20% attribution standard would remain unreasonable and would subject the FCC to further appeal and remand, delaying service to the public contrary to Congressional intent as indicated in 47 U.S.C. §309(j)(3). DCR and Mountain cite to the 1996 Act for support of an even lower attribution standard. DCR Comments at 15 and Mountain Comments at 12. DCR and Mountain's only support for the use of the 10% equity interest threshold found in the definition of "affiliate" in Section 153 of the 1996 Act, 47 U.S.C. §153(a)(2)(33), as the threshold for "control" in the context of spectrum caps is that "[b]ecause Congress may be arbitrary and capricious if it wishes to be, the use of a statutory benchmark should prevent further court challenge." Mountain Comments at 12. Their advocated reliance on a statutory benchmark is unpersuasive in light of the lack of any indication that the definition of "affiliate" in the 1996 Act was designed to serve as the standard for ownership attribution in every context. In view of the Court's rejection of a 20% ownership attribution threshold and exhortation that the FCC adopt a test rooted in concepts of control, Western maintains that blind reliance on the 10% 1996 Act threshold, without any record evidence to support the reasonableness of this choice, would almost certainly insure, not prevent, further court challenge.

[51] Western Comments at 26-27.

service is the carrier's ability to divest interests so as to come into compliance with the spectrum caps.[52] The current rules limit the reach of the divestiture rules by imposing severe limitations on the pool of permissible buyers. Currently, only rural telephone companies are eligible for PCS licenses for partitioned markets, and then only if the partitioned area is "reasonably related to the rural telephone company's wireline service area." 47 C.F.R. § 24.714(d).[53] Western thus urged the FCC to permit partitioning of PCS licenses to all parties that are qualified to be licensees. Other commenting parties have demonstrated that permitting all qualified entities to become licensees of a portion of a PCS market is in the public interest. AT&T has reasoned that "permitting disaggregation will encourage entry by small business" and "geographic partitioning would increase the diversity of PCS licensees by allow small entities to purchase an authorization for a portion of a service area."[54] Another commenter has explained that partitioning would assist in the FCC's goal of providing service to rural areas by permitting MTA and BTA licensees to

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[52] *Id.* at 24.

[53] A reasonable relationship is presumed if the partitioned service area contains no more than twice the population overlap between the rural telephone company's wireline service area and the partitioned area. 47 C.F.R. §24.714(d). Western reiterates that the benefits of cellular carriers' wireless expertise and existing infrastructure and the Congressional imperative of relaxing barriers to entry in telecommunications services require that the FCC allow cellular carriers to acquire <u>and retain</u> PCS spectrum except in those cases where the record evidence supports a strong potential for anticompetitive effect. The more relaxed partitioning rules that Western advocates should not be a substitute for the revised cross-ownership rules; rather, they should apply in those cases where allowing a party to retain its cellular and PCS interests would threaten to undermine vigorous PCS development.

[54] AT&T Comments at 11-12.

transfer the rights of such areas to those who value them most.[55] Permitting the sale of portions of a PCS service area to any party qualified to be a licensee will fulfill the goals that Congress mandated by providing economic opportunity for small businesses and promoting investment and deployment of new services.[56]

III. Any Qualified C-Block Bidder Should Be Eligible to Bid on F- Block Licenses

Western and others have demonstrated[57] that C-block license holders should be able to exclude the value of their C-block licenses from their total asset and gross revenue calculations so as to preserve their ability to bid on F-block licenses. Otherwise, the FCC would exclude from bidding those licensees who because of their expertise and experience would be in the best position to utilize economies of scope and experience to promote the efficient introduction of PCS service,[58] and would treat C-block licensees disparately for purposes of F-block eligibility depending on the vagaries of the timing of their C-block license award, not reasoned policy.[59] Furthermore, the acknowledged benefits of

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[55] ALLTEL Corp. Comments at 7; *see also* Columbia Comments at 2; Integrated Comm. Group Corp. Comments at 1 ("ICG"); Integrated VoiceSys Comments at 2.

[56] 47 U.S.C. § 309(j)(3).

[57] Western Comments at 28-29, Omnipoint Comments at 5-6, NextWave Telecom Inc. Comments at 3-6. Western here points out that the heading on page 28 of its Comments should read "C. Any qualified C Block Bidder Should Be Eligible to Bid on F-Block Licenses."

[58] Western Comments at 28.

[59] *Id.* at 28-29 (those licensees that were awarded their licenses earlier would have to include that value as an asset and those who were awarded their licenses later would be able to exclude it).

geographic and spectral aggregation of licenses would be impeded.[60] Finally, the FCC's rules currently permit assignment or transfer of control of an entrepreneur block license to any entity that, at the time the application for assignment or transfer of control is filed, holds other entrepreneur block license(s) and, at the time of receipt of such license(s), met the eligibility criteria set forth in Section 24.709, even if their other entrepreneur block licenses would cause them to exceed the eligibility limits. Requiring inclusion of the value of an existing C-block license for purposes of eligibility for the F-block auction would be inconsistent, unfair and illogical.[61]

IV. The FCC Should Retain the Most Favorable Installment Method and Maximum Bidding Credit for Small Businesses Acquiring F-Block Licenses

The overwhelming majority of the Comments have advocated that the FCC should retain in the F-block auction the most favorable installment method and maximum bidding credits available to participants in the C-block auction, in order to assist small businesses in

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[60] Western Comments at 29; Omnipoint Comments at 5; and NextWave Comments at 3-4.

[61] 47 C.F.R. §§24.709(3) and 24.839(d). Western Comments at 29, Omnipoint Comments at 6, NextWave Comments at 4-5. Four parties have requested that the value of C-block licenses be included in total assets and revenues for purposes of eligibility for the F-block auction. Airlink Comments at 10-11; Conestoga Comments at 3; Point Enterprises Comments at 3 (making the speculative statement that because C-block bidders do not require additional spectrum and could better spend the money elsewhere, they should not automatically be permitted to bid in the F-block auction); Rendall Comments at 8-9; Harvey Leong Comments at 4. Their justification that C-block licensees do not need additional spectrum flies in the face of the FCC's policy to allow a single licensee to hold up to 40 MHz of broadband PCS spectrum in the same geographic area (*i.e.*, a 30 MHz and a 10 MHz license), 47 C.F.R. §24.229(c). Furthermore, their argument that the size of the bids made by the C-block bidders indicates they are no longer small businesses ignores the fact that these bidders have complied with the FCC's rules for entrepreneur block eligibility and small business treatment.

acquiring PCS licenses.[62] The commenting parties see the F-block as the only remaining opportunity to assist small businesses in acquiring PCS licensees.[63] Only AT&T has requested the deletion of small business benefits from the F-block auction, because they believe that the C-block bids indicate that such benefits are not necessary in view of the high bids made by "small businesses."[64] However, AT&T's comments do not offer the statistical data or economic theory necessary to support a wholesale about-face in the FCC's rules for the entrepreneur blocks midway through the PCS spectrum auctions.

V. Neither Installment Payment Plans Nor Bidding Credits Should Be Extended to the D and E-Blocks

The FCC should not extend installment payment plans to small businesses bidding on the D and E-blocks. As was demonstrated in the Comments, many of the "small businesses" that, in theory, needed federal benefits to allow them to compete with the larger companies have bid through their bidding credits, and presumably do not need the additional financial assistance afforded by installment payment plans to compete with the entities that do not qualify for small business status.[65] Many parties have requested that

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[62] Western Comments at 29-30; Liberty Cellular Comments at 7-8; Iowa LP 136 Comments at 5-6; Coalition of New York Rural Telephone Companies Comments at 5-6; Personal Comm. Industry Assn. Comments at 11-14 ("PCIA"); Mid-Plains Telephone Co. Comments at 1-3 ("Mid-Plains"); Conestoga Comments at 3; KMTel Comments at 5; and Mountain Comments at 4.

[63] *Id.*

[64] AT&T Comments at 4-7.

[65] Western Comments at 30-31; US West, Inc. Comments at 2-5 (C-block applicants are using such benefits as a way to bid up the value of PCS licenses in an economically inefficient fashion, *citing* Robert G. Harris "The Use of Bidding Preferences in the D, E and F-Block Auctions"); TDS Comments at 8-9; Sprint Comments at 7; and Vanguard Comments at 3.

small business benefits be extended to the D and E-block auctions as a way to provide greater opportunity for small businesses, but they have not provided any evidence that, without such benefits, small businesses will be unable to participate.[66] Small businesses already are receiving benefits in the C and F-block auctions. Changing the rules in the middle of the game would be unfair to those parties who have established their bidding strategy based on the existing rules.[67] In addition, such action would discriminate against midsize companies who have their own financing, but are unable to compete with small businesses backed by large investors.[68]

A number of commenters have requested that the FCC restrict the remaining auctions to small businesses and rural telephone companies.[69] Doing so would be unfair to all the parties who have targeted the 10 MHz auctions in view of their business plan (i.e., to provide a "niche" service requiring less than 30 MHz of spectrum) or financial position. To

[66]Phoenix L.L.C. Comments at 3-4; US Intelco Wireless Comm. Inc. Comments at 6 ("Intelco"); Omnipoint Comments at 2-4; Antigone Comments at 8; Airlink L.L.C. Comments at 11-12; Nat'l Telecom PCS Inc. Comments at 4-5; ICG Comments at 1; Columbia Comments at 1; PCC Comments at 2; Gulfstream Comments at 3; DCR Comments at 4-11; Rendall Comments at 11; NCMC Comments at 3-13; Virginia PCS Alliance, L.C. at 6-7 ("Virginia"); Radiofone Comments at 11; Devon Mobile Comm. Comments at 8, 11-12; Mid-Plains Comments at 4; KMTel Comments at 5; Mountain Comments at 4, 7-8. Several parties have requested additional benefits for very small businesses. Columbia Comments at 2; ICG Comments at 1-2; and Harvey Leong Comments at 4. However, they justify this only by stating that such entities cannot compete without such additional benefits. The Court requires something more.

[67]General Wireless, Inc. Comments at 2-5.

[68]Vanguard Comments generally.

[69]Liberty Cellular Comments at 5-7; Iowa LP 136 Comments at 2; Bray Comments at 1; and Radiofone Comments at 11.

change the eligibility now would preclude participation by parties who had a legitimate expectation that they could bid in these remaining auctions.

VI. The FCC Should Implement Substantial Increases in the Amounts of the Upfront and Down Payments for the F- Block in Order to Minimize Insincere or Frivolous Bidding

A number of the commenters support the FCC's proposal to increase the amount of the upfront and down payment for the F-block auction in order to minimize the possibility of insincere or frivolous bidding and to limit the potential for default.[70/] While Intelco and PCIA argue that reduced upfront and down payments should be maintained,[71/] the reasons that they allege in support of this position[72/] are contradicted by evidence of exorbitant bidding. Thus, the record supports an increase in the amounts of the upfront and down payments.

VII. The FCC Should Amend the Rules to Limit the Information Disclosure Requirement, Delete the Requirement that Partnership Agreements Be Filed, and Permit the Use of Unaudited Financial Information

Many of the commenters, including Western,[73/] support the proposal to limit the information disclosure requirement to require only the disclosure of attributable stockholders' direct, attributable ownership in other businesses holding or applying for

[70/] Western Comments at 31-33; AT&T Comments at 7-8; Cook Inlet Comments at 6-8; Sprint at 4-5; Airlink Comments at 10; and Go Comm. Corp. Comments at 1.

[71/] Intelco Comments at 7, PCIA Comments at 14.

[72/] For example, Intelco asserts that reduced pressures on cash flow enhance the ability of small businesses to attract capital, without adducing any empirical data or even a general economic theory to support this conclusion. Intelco Comments at 7.

[73/] Western Comments at 33-35; Airlink Comments at 17-18; Antigone Comments at 9; NCMC Comments at 18; Vanguard Comments at 6-7; Virginia Comments at 10; Liberty Cellular Comments at 2-3; and Mid-Plains Comments at 5.